ARIZONA'S COUNTY GRAND JURY: THE EMPTY PROMISE OF INDEPENDENCE

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Arizona law guarantees an individual the right to be indicted by a grand jury that is unbiased and independent.[1] In an attempt to fulfill the promise of independent determinations of probable cause and of protecting people from "unfounded criminal prosecutions,"[2] the law insists that the grand jury act independently of the prosecutor and judge.[3] The Arizona Supreme Court has stated that "complete freedom of thought" is an "essential" element of the properly functioning grand jury.[4] Ultimately, by insisting on grand jury independence, the law seeks to ensure that grand jury determinations are "informed, objective, and just."[5]

These are the law's stated goals. As this Note will demonstrate, however, in actual practice the independence of the grand jury has become more appellate court rhetoric than reality.

The question of grand jury independence is not new.[6] However, the

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1. Crimmins v. Superior Court, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983) (citing State v. Emery, 131 Ariz. 493, 506, 642 P.2d 838, 851 (1982) and Marston's Inc. v. Strand, 114 Ariz. 260, 560 P.2d 778 (1977)). Arizona law, however, does not guarantee the right to be prosecuted upon an indictment only. ARIZ. CONST. art. II, § 30 provides: "No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination." *Id.*

This option of commencing felony prosecutions upon indictment or information has withstood challenges brought under the fifth and fourteenth amendments to the United States Constitution. Hurtado v. California, 110 U.S. 516, 538 (1884) (prosecution after examination before a magistrate does not violate due process); State v. Bojorquez, 111 Ariz. 549, 553, 535 P.2d 6, 10 (1975) (prosecution upon either indictment or information does not violate due process) (citing State v. Cousino, 18 Ariz. App. 158, 160, 500 P.2d 1146, 1148 (1972) ("[A] prosecuting attorney may proceed by either indictment or information without violating the Fourteenth Amendment. . .")).

2. *Crimmins*, 137 Ariz. at 43, 668 P.2d at 886 (Feldman, J., specially concurring).

3. *Strand*, 114 Ariz. at 264, 560 P.2d at 782.

4. State v. Superior Court, 102 Ariz. 388, 389, 430 P.2d 408, 409 (1967) (quoting 38 C.J.S. *Grand Juries* § 6 (1943 and Supp. 1966)).

5. *Crimmins*, 137 Ariz. at 41, 668 P.2d at 884.

6. *See, e.g.*, D. EMERSON, GRAND JURY REFORM: A REVIEW OF KEY ISSUES 1, 21 (National Institute of Justice Monograph, Jan. 1983); N. AMES & D. EMERSON, THE ROLE OF THE GRAND JURY AND THE PRELIMINARY HEARING IN PRETRIAL SCREENING 1, (National Institute of Justice Research Report, May 1984); L. CLARK, THE GRAND JURY, THE USE AND ABUSE OF POLITICAL POWER 141 (1975); M. FRANKEL & G. NAFTALIS, THE GRAND JURY—AN INSTITUTION ON TRIAL 22-23 (1975); Braun, *The Grand Jury—Spirit of the Community?*, 15 ARIZ. L. REV. 893 n.3 (1973); Comment, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761 n.1 (1972).

An excellent grand jury practice aid is S. BEALE & W. BRYSON, GRAND JURY LAW AND PRACTICE (1986).

independence issue remains an important one for the layman and Bar member alike because the grand jury is the preferred method for commencing criminal felony prosecutions in Pima County.[7]

This Note examines the independence of the county grand jury in Arizona. After reviewing the grand jury's historical roots in England, colonial and post-colonial America, and in Arizona, this Note describes the Arizona statutes governing the county grand jury system. It then explains some of the practical problems which defeat legislative and judicial attempts to protect the grand jury's independence. Finally, after discussing judicial reaction to some of these problems, this Note offers for consideration some institutional reforms aimed at closing the gap between the rhetoric of and what actually is the case regarding grand jury independence. Excluded from this Note is any examination of the grand jury's investigatory role,[8] and any examination of Arizona's state grand jury.[9]

HISTORICAL BACKGROUND

England

The modern grand jury developed only after centuries of criminal justice experience. Although obscure, the origins of the present grand jury system can be traced back to Saxon England.[10] Most modern commentators, however, believe the grand jury's origins date from 1166 and King Henry II's Assize of Clarendon.[11]

By providing for an accusatory jury, Chapter One of the Assize of Clarendon[12] instituted a new procedure for formally accusing suspected

7. N. AMES & D. EMERSON, *supra* note 6, at 32. The authors estimate that 74% of the total felony cases that survive the initial prosecutorial screening process are presented to a grand jury. *Id.* at 37. The figure for Maricopa County is only 12%. *Id.*

8. Grand juries have two chief roles: an investigatory role and an accusatory or pre-trial screening role. *See* N. AMES & D. EMERSON, *supra* note 6, at 2; Comment, *supra* note 6, at 763 n.14; Braun, *supra* note 6, at 897.

9. ARIZ. REV. STAT. ANN. §§ 21-421 through 21-428 (Supp. 1986) establish a state grand jury impaneled upon written application of the state attorney general. The state grand jury's jurisdiction is limited to certain enumerated offenses. *Id.* at § 21-422.

10. Saxon law contained provisions for the "twelve senior thanes in every hundred or wapentake" to accuse persons suspected of public offenses. G. EDWARDS, THE GRAND JURY 1, 3-4 (reprint 1973). This was most likely codified in the Wantage Code promulgated during the reign of King Ethelred II (978-1016). Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 614 (1983); G. EDWARDS, *supra*, at 2-3.

11. Helmholz, *supra* note 10, at 614-16; G. EDWARDS, *supra* note 10, at 2; R. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 1 (1963); M. FRANKEL & G. NAFTALIS, *supra* note 6, at 6; Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 703 (1972); L. CLARK, *supra* note 6, at 7-8; D. EMERSON, *supra* note 6, at 9.

Historians justify their refusal to accept the Saxon roots of the grand jury on the ground that there is little "positive intervening evidence" affirming the existence of an accusatory jury between the Saxon legal code and the Assize of Clarendon. Helmholz, *supra* note 10, at 615. Such evidence, however, does exist. Shortly before issuing the Assize of Clarendon, Henry II had offered the Church use of his "sheriff's accusing jury" with which the ecclesiastical courts could lawfully accuse a layman under Chapter 6 of the Constitutions of Clarendon. Schwartz, *supra*, at 706-07. An English translation of the Constitutions of Clarendon can be found in G. ADAMS & H. STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 11-14 (1924).

12. The text of Chapter One of the Assize of Clarendon includes the following:

> In the first place, the aforesaid King Henry, with the consent of all his barons, for the preservation of the peace and the keeping of justice, has enacted that inquiry should be

criminals.[13] King Henry formalized the accusing jury in an attempt to increase royal revenue, rather than out of any desire to benefit his subjects.[14] Chapter Five of the Assize commanded that all properties confiscated from or forfeited by those accused by the jury would accrue to the king rather than to the barons as was the previous custom.[15] Through this provision and others,[16] the king established the grand jury as an instrument through which he exercised local control.[17]

Although recognizable in form,[18] the early grand jury functioned somewhat differently than its modern descendant. The jury was not limited to

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made through the several counties and through the several hundreds, by twelve of the most legal men of the hundred and by four of the most legal men of each vill, upon their oath that they will tell the truth, whether there is in their hundred or in their vill, any man who has been accused or publicly suspected of himself being a robber, or murderer, or thief, or of being a receiver of robbers, or murderers, or thieves, since the lord king has been king. And let the justices make this inquiry before themselves, and the sheriffs before themselves.

G. ADAMS & H. STEPHENS, *supra* note 11, at 14-15.

13. Before the institution of the accusing jury, the alleged victims accused the suspects. Schwartz, *supra* note 11, at 708. Because accusation by the "twelve most lawful men" was a weighty accusation, the Assize also mandated that the accused be tried by the ordeal of water—a procedure almost always resulting in the accused's death. *Id.*; Assize of Clarendon, Chap. 2, *reprinted in* G. ADAMS & H. STEPHENS, *supra* note 11, at 15. For a chilling description of the cold water ordeal, see M. FRANKEL & G. NAFTALIS, *supra* note 6, at 7-8.

14. Schwartz, *supra* note 11, at 708-09.

15. *Id.* Chapter Five of the Assize reads as follows:

[A]nd in the case of those who have been arrested through the aforesaid oath of this assize, no one shall have court, or judgment, or chattels, except the lord king in his court before his justices, and the lord king shall have all their chattels. In the case of those, however, who have been arrested, otherwise than through this oath, let it be as it has been accustomed and ought to be.

G. ADAMS & H. STEPHENS, *supra* note 11, at 15.

Also, because increasing royal revenue was Henry's motivation behind the establishment of the accusing jury, jurors were fined for not accusing suspected offenders and for failing to accuse a sufficient number of offenders. Schwartz, *supra* note 11, at 709.

16. Schwartz, *supra* note 11, at 709 nn.36-38.

17. Schwartz, *supra* note 11, at 709.

18. The official status of the accusatory jury was re-affirmed in documents issued after the Assize of Clarendon. *See e.g.*, Assize of Northhampton, Chap. 1, *reprinted in* G. ADAMS & H. STEPHENS, *supra* note 11, at 20-21; Great Charter of Liberties (King John-1215), pars. 36, 39, *reprinted in id.*, at 47; The Great Charter (King Henry III-1225), Chap. 29, *reprinted in* 1 STATUTES AT LARGE FROM MAGNA CHARTA TO THE TWENTY-FIFTH YEAR OF THE REIGN OF KING GEORGE THE THIRD, INCLUSIVE 7 (London 1756).

By 1368 the grand jury had appeared in a form that would be recognizable today. G. EDWARDS, *supra* note 10, at 2. In that year, the practice of impanelling twenty-four men for the county inquest was established. This body was called *"le graunde inquest."* *Id.*; J. REEVES, 3 HISTORY OF THE ENGLISH LAW 133 (reprint 1969). Previously, inquests consisted of twelve men from each "hundred." *See supra* note 12. A "hundred" was an administrative unit of an English county. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 692 (1969). Frequently, each hundred contained its own court. 5 THE OXFORD ENGLISH DICTIONARY 456 (1933, 1970 reprint). The term *"le graunde inquest"* distinguished the numerically larger twenty-four knight county inquest from the smaller twelve men "hundred" inquest, not from the *petit* jury as one might reasonably expect. G. EDWARDS, *supra* note 10, at 26.

The emergence of the jury as the major method of trial occurred *circa* 1215. In that year the Fourth Lateran Council of the Roman Catholic Church forbade the clergy from participating in trials by ordeal. This effectively eliminated the ordeal as a trial method in all kingdoms subject to the Church's authority. Only trial by battle and "trial by the country," *i.e.*, jury trial, remained as accepted trial procedures. Ultimately, the king's judges seized upon the inquest as the preferred trial method because the trial by battle was available only under limited circumstances. *Id.* at 18. For a time the accusing inquests also acted as the finders of guilt or innocence, but eventually, two distinct juries emerged. *Id.* at 21-25.

merely indicting or presenting[19] individuals suspected of criminal activity; it also monitored public works projects such as bridges and highways.[20] Further, juries were responsible for inspecting the local "gaols," or jails, and for reporting on the sheriff's administration of those jails.[21] These public works functions were enhanced in the American grand jury system.[22]

Early grand juries differed in one respect from present-day grand juries in that they lacked legally sanctioned secrecy in their deliberations.[23] Nevertheless, jurors took an oath requiring them to "conceal those things which they have heard." Judges could interrogate the jury or individual jurors as to their findings,[24] but this practice fell into disuse as the petit jury emerged as the principle trial technique.[25] The purpose of this secrecy was to prevent the escape of potential indictees.[26]

It was this secrecy and the lack of interrogation that laid the foundation for the grand jury's independence from the crown and its prosecutors.[27] The first well-known exercise of this independence is found in the early cases of Stephen Colledge and the Earl of Shaftesbury.[28] In 1681, two London grand juries refused to indict either man on Charles II's charges of high treason.[29] The grand juries' essentially populist action against a Catholic king[30] is primarily responsible for the high esteem which Englishmen and Americans

19. The grand juries would "present" someone to the court when the accusation was based on facts that originated within the grand jury. An "indictment" was based on facts that originated outside the grand jury. R. YOUNGER, *supra* note 11, at 1. The grand jurors could investigate any matter that "appeared" to be a violation of the law. *Id.*

20. G. EDWARDS, *supra* note 10, at 25.

21. *Id.*

22. *See infra* notes 33-39 and accompanying text.

23. G. EDWARDS, *supra* note 10, at 21. Modern Arizona grand juries benefit from statutory secrecy requirements. *See* ARIZ. R. CRIM. P. 12.5 which reads, "No person other than the grand jurors shall be present during their deliberation and voting." *See also* ARIZ. REV. STAT. ANN. § 13-2812 (1978), where unauthorized disclosure of grand jury material is defined as a misdemeanor offense.

24. G. EDWARDS, *supra* note 10, at 21.

25. *Id.* at 27-28. Before the emergence of the trial jury, the accused would usually undergo trial by ordeal and die as a result. *See supra* note 13. Thus, trial by jury no longer meant that mere accusation resulted in death by ordeal, and the judges felt it unnecessary to interrogate the accusing jury if the judges suspected the appropriateness of the accusation. Instead after trial (and while the accused was still alive), the judges interrogated the petit jurors when the verdict was suspect. G. EDWARDS, *supra* note 10, at 27-28.

26. G. EDWARDS, *supra* note 10, at 27-28.

27. G. EDWARDS, *supra* note 10, at 28.

28. M. FRANKEL & G. NAFTALIS, *supra* note 10, at 9.

29. G. EDWARDS, *supra* note 10, at 28-30; Schwartz, *supra* note 11, at 714-21.

30. The treason charges took place at a time when religious strife was prevalent in England. Charles II sought to restore the Roman Catholic Church to its former prominence by providing that his Catholic brother, James, the Duke of York, succeed him to the throne. At this same time Parliament and most Englishmen were Protestant and virulent anti-Catholics.

Protestants Shaftesbury and Colledge acted to prevent Charles's plan from succeeding by attempting to have a grand jury indict James as a "recusant"—one who refused to accept the rites of the English Church. Such an indictment would have prevented James's succession. Charles's chief justice, however, discharged the grand jury before it could actually indict James.

Shortly thereafter, the king responded in kind by seeking the treason indictments against Colledge and Shaftesbury. After hearing the king's evidence, both London grand juries, picked by Protestant sheriffs, refused to indict. Schwartz, *supra* note 11, at 710-18.

This refusal was not without its consequences. The foreman of the Colledge grand jury was arrested, sent to the Tower, and later forced to flee England. The king's charge against Colledge was place before another more sympathetic grand jury in Oxford. Colledge was indicted, tried, and executed. Shaftesbury's case was to be represented to another London grand jury after Charles had

have historically held for the grand jury system.[31] Further, these two cases form the common law foundation for recognition of the "grand jury as the barrier between the accused and the accuser."[32]

Early American Grand Juries

As was the case in England, the colonial grand juries had extra-judicial functions. Frequently, grand juries proposed new ordinances, performed administrative tasks, and acted as spokesmen for the local community.[33] In essence, the grand juries acted as local legislatures and exerted a democratizing influence in the crown and proprietorial colonies.[34]

This democratizing influence was readily apparent during the Revolutionary War, particularly in Massachusetts where the popularly elected juries were biased in favor of the independence movement and its leaders.[35] Grand juries took a leading role against the English crown and government.[36] Local Massachusetts grand juries refused to indict Stamp Act riot leaders, and newspapers which libeled royal officials.[37] When the royal prosecutor failed to prosecute presentments returned against British soldiers, the local grand juries responded by refusing to return any indictments on charges given to them by the royal judges or prosecutors.[38] The juries, by effectively seizing control of the administration of local government, did much to prevent anarchy during the period between royal control and fully established independent state government.[39]

Despite the high degree of respect and importance with which revolutionary-era Americans viewed the grand jury as an institution,[40] only two of

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secured the election of compliant sheriffs. Realizing the probability of indictment by a grand jury picked by the newly elected sheriffs, Shaftesbury fled England and died in exile. *Id.* at 715-19.

It is ironic that these two cases, which reveal the grand jury's vulnerability to political corruption and popular pressures, are remembered as the first instances of grand jury independence. *See id.* at 720-21. However, while these cases exemplify the grand jury's vulnerabilities, they also exemplify the grand jury's ability to act independently in the face of political pressure.

31. R. YOUNGER, *supra* note 11, at 2.

32. Schwartz, *supra* note 11, at 721.

33. R. YOUNGER, *supra* note 11, at 2. For a detailed account of the selection and operation of grand juries in early America, *see generally id.* Examples of the grand juries' extra-judicial functions included rousing public opinion against merchants who had cheated the citizenry, and against local government officials who were lax in the performance of their duties, *id.* at 7; keeping public morality at an acceptable level, *id.* at 7-8; enforcing education requirements for children, *id.* at 9; supervising public works projects, *id.*; helping select petit jurors, *id.*; ascertaining the value of property taken by eminent domain, *id.* at 11; settling boundary disputes, *id.* at 12; and proposing new taxes and other laws, *id.* at 13, 15. In addition, because Georgia had no elective assembly under the rule of its proprietor, James Olgelthorpe, the grand jury was the only popularly selected body which possessed any means for voicing popular expression, *id.* at 16-17.

34. *See id.* at 26; *and see* L. CLARK, *supra* note 6, at 15.

35. R. YOUNGER, *supra* note 11, at 27.

36. *Id.*

37. *Id.* at 28-30.

38. *Id.* Lord North attempted to solve the colonial grand jury problem by abolishing the elected grand jury and empowering the sheriffs to select the jurors. *Id.* at 31-32; 14 George 3, ch. 45. Public pressure, however, prevented the sheriffs from carrying out North's Coercive Acts. Those sheriffs that attempted obedience quickly and publicly acknowledged their "great mistake[s]." R. YOUNGER, *supra* note 11, at 32-33.

39. *Id.* at 36. Grand juries turned their attention to law enforcement, taxes, and public services which were still essential to civilized life during warfare. *Id.* at 36-37.

40. *Id.* at 41.

the new state constitutions drafted in 1776 and 1777 contained any guarantee of the right of indictment.[41] Each of the states, however, provided for grand juries by statute, and suggestions of abolishing the institution were rare.[42]

The federal Constitution, as originally ratified by the states, made no provision for a federal grand jury system.[43] Several states that ratified the Constitution at the same time expressed a desire to amend it.[44] Among the desired amendments was a provision for indictment by a grand jury, at least for capital offenses.[45] James Madison introduced several amendments, including a grand jury amendment, to the First Congress on June 8, 1789.[46] The House of Representatives adopted the grand jury clause virtually without debate on August 21, 1789.[47]

Incorporating the Grand Jury Clause Into the Fourteenth Amendment

Despite the presence of the grand jury clause in the fifth amendment, the clause has not been applied to the states through the fourteenth amendment's due process clause.[48] The United States Supreme Court has specifi-

41. *Id.* at 37. North Carolina and Georgia guaranteed the right of indictment in all criminal cases. *Id.* at n.32.

42. *Id.* at 37.

43. *See* U.S. CONST. art. I-VII. This omission was the result of a tactical decision, designed to secure ratification, that the Constitution should not elaborate on the federal judiciary for fear of "alarm[ing] others." R. YOUNGER, *supra* note 11, at 45. The absence of any provision for a grand jury or right of indictment, however, only served to provide support to those who opposed the federal Constitution as it was presented for ratification. *See, e.g., Letters of the Federal Farmer to the Republican, Jan. 20, 1788, reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 328 (H. Storing ed. 1981); *Essays by Hampden, Jan. 26 1788, reprinted in* 4 THE COMPLETE ANTI-FEDERALIST at 198, 200. Hampden wrote:

> [An indictment by the grand jury] is the greatest security against arbitrary power; without this, every person who opposes the violation of the constitutional right of the people, may be dragged to the bar, and tried upon a bare information of an Attorney-General.— The loss of this privilege carries with it the loss of every friend of the people.—There is no instance yet, in England, or in America, excepting in the Stuart's reign, of a person's being tried for his life, otherwise than upon indictment. It was attempted before the Revolution, but successfully opposed.

Id. at 200.

44. 2 F. THORPE, CONSTITUTIONAL HISTORY OF THE UNITED STATES 199 (reprint 1970).

45. R. YOUNGER, *supra* note 11, at 45.

46. F. THORPE, *supra* note 44, at 199, 210. The grand jury provision passed through four drafts of the proposed amendments, but remained essentially the same throughout. *Id.* at 210, 227, 258, 260.

47. 1 ANNALS OF CONGRESS OF THE UNITED STATES, FIRST CONGRESS 767 (J. Gales ed. 1834) (microfiche). The only semblance of debate was upon Representative Thomas Burke's motion to amend the clause so as to provide for indictments in all criminal cases; the House rejected this proposal. *Id.* at 756, 760; I. BRANT, THE BILL OF RIGHTS, ITS ORIGIN AND MEANING 64 (1965). Mr. Burke was a representative from North Carolina. Perhaps he sought to modify the proposed federal grand jury clause on the North Carolina constitutional provision. *See supra* note 41.

The Senate agreed to the amendments, including the grand jury clause, on September 25, 1789. F. THORPE, *supra* note 44, at 259 n.3. There is no official record of the Senate debates on the grand jury clause because, until the second session of the Third Congress, the Senate debated in closed session. ANNALS, *supra*, at 16. The grand jury clause, as part of the fifth amendment, was ratified by the states and became part of the Constitution in 1791. The fifth amendment provides in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless, on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger. . . ."

48. Hurtado v. California, 110 U.S. 516 (1884).

cally not required the states to prosecute felonies upon indictments only.[49] The states are free to commence all criminal prosecutions solely upon a prosecutor's information.[50] In fact, due process does not require that there be any judicial determination of probable cause before a state subjects a person to the social stigma, psychological trauma, and economic expense of a criminal trial.[51]

When, however, a state does choose to employ the grand jury mechanism, it is probable that the state must then comply with fourteenth amendment due process.[52] Although the United States Supreme Court has yet to squarely decide this issue,[53] the Arizona Supreme Court has interpreted the United States Supreme Court decision in *Beck v. Washington*[54] as requiring the states to provide fourteenth amendment due process when they utilize the grand jury system.[55] This due process protection usually requires an impartial and independent grand jury.[56]

The Arizona Constitutional Convention

The Arizona State Constitution provides that a person may be tried after indictment or information followed by a preliminary examination.[57] This provision has remained unchanged since the constitution's ratification in 1911.[58] Prior to statehood, however, all felonies prosecuted in the Ari-

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49. *Id.* The Court rested its holding primarily on two maxims of statutory construction. First, the Court invoked the maxim that all words in the Constitution must be given meaning and that the drafters did not use superfluities. Thus, since the fifth amendment provided for both the right of indictment and due process of law, the right to a grand jury indictment was distinct from due process of law. *Id.* at 534-36; J. COOK, 2 CONSTITUTIONAL RIGHTS OF THE ACCUSED 436-37 (2d ed. 1986).

Second, where the drafters used identical language in different parts of the Constitution, the Court would presume identical meaning absent contrary evidence. Therefore, because the fifth amendment due process is distinct from and does not require grand jury indictments, neither does the fourteenth amendment due process clause. *Id.* at 437; *Hurtado*, 110 U.S. at 535.

50. *See* Beck v. Washington, 369 U.S. 541, 545 (1962).

51. Gerstein v. Pugh, 420 U.S. 103, 119 (1975). If, however, the state places a "significant restraint" upon the suspected offender's liberty, then, under the fourth and fourteenth amendments, a judicial determination of probable cause is required. *Id.* at 124-25, 125 n.26.

52. *See Beck*, 369 U.S. at 546; Martin v. Beto, 397 F.2d 741, 751-53 (5th Cir. 1968) (Thornberry, J., concurring specially).

53. J. COOK, *supra* note 49, at 438; *Beck*, 369 U.S. at 546.

54. 369 U.S. 541 (1962).

55. State v. Emery, 131 Ariz. 493, 506, 642 P.2d 838, 851 (1982). The court does not cite *Beck* directly, but does cite Corbin v. Broadman, 6 Ariz. App. 436, 433 P.2d 289 (1967), which explicitly relied on *Beck*. *Id.* at 441, 433 P.2d at 294.

Other states have similar due process decisions. *See, e.g.*, State v. Pacific Concrete and Rock Co., 57 Haw. 574, 576, 560 P.2d 1309, 1311 (1977); State v. Porro, 152 N.J. Super. 259, 265, 377 A.2d 950, 953 (1977), *aff'd*, 158 N.J. Super. 269, 385 A.2d 1258 (1978), *cert. denied*, 439 U.S. 1047 (1978).

56. *Emery*, 131 Ariz. at 506, 642 P.2d at 851; Crimmins v. Superior Court, 137 Ariz. 39, 41, 668 P.2d 882, 884 (1983); *Pacific Concrete*, 57 Haw. at 576, 560 P.2d at 1311; *Porro*, 152 N.J. Super. at 267, 377 A.2d at 953; *see supra* notes 1-5 and accompanying text.

57. ARIZ. CONST., art. II, § 30; *see supra* note 1.

58. The state constitution only became effective, however, after Arizona's admission into the Union in 1912. Informations would also have been permitted under Arizona's draft constitution of 1891. W. SWINDLER, 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 262 (1973).

zona Territory were commenced upon indictment only.[59]

There were public expressions of dissatisfaction with the mandatory grand jury system of territorial Arizona. The contemporary press lambasted the grand jury as "out-of-date," recommending it be tossed upon the "junk pile of discarded institutions."[60] Such criticism's cited the system's expense, lengthy time delays, and disutility in the "modern" times.[61] And, because the public was likely to "accept a grand jury indictment as practically a verdict of guilty," the press charged the grand jury with perpetrating "injustices."[62]

The delegates to the 1910 Arizona State Constitutional Convention sympathized with this popular dissatisfaction,[63] and considered a proposition permitting criminal prosecution upon indictments or informations.[64] The proposition passed with little debate[65] by an overwhelming vote of 44 to 6.[66]

CURRENT CONSTITUTIONAL AND STATUTORY PROVISIONS

All but ten state constitutions specifically provide for commencement of criminal prosecutions by information or indictment.[67] In some of these states, however, appellate courts have held that the due process guarantees embodied in the state constitutions require indictments in certain instances.[68] Of the forty constitutions which specifically address the question

59. *See, e.g.*, Compiled Laws of the Territory of Arizona., ch. XI, § 7 (1871); *id.* (1877); Rev. Stat. of Ariz., Penal Code, § 1370 (1887); *id.*, §§ 786-88 (1901).

60. The Arizona Republican, Nov. 1, 1910, at 4, col. 1.

61. *Id.*

62. Arizona Daily Star, Nov. 8, 1910, at 4, col. 3.

63. Bakken, *The Arizona Constitutional Convention of 1910*, 1978 ARIZ. ST. L.J. 1, 4.

64. Arizona Daily Star, Nov. 9, 1910, at 1, col. 7.

65. Mr. E.E. Ellinwood, a Bisbee lawyer and delegate from Cochise County, D. VAN PETTEN, THE CONSTITUTION AND GOVERNMENT OF ARIZONA 21 (1952), opposed allowing prosecution upon informations because he feared prosecutorial abuse of the informing power. JOURNALS OF THE CONSTITUTIONAL CONVENTION OF ARIZONA 124 (C. Cronin ed. 1925) (microfiche). Proponents of the proposition countered Mr. Ellinwood's argument by noting the safeguards provided by the mandatory preliminary hearing. *Id.* But, Ellinwood was unmoved; he considered the grand jury the "greatest preliminary hearing a person can be granted." *Id.* at 125. The proponents also raised the issues of undue delay and expense as well as the stigma resulting from any indictment. *Id.* at 124-25. Alas, despite Mr. Ellinwood's valiant protestations and his eloquence, the information proposition was the first proposition to pass the convention.

66. Arizona Daily Star, Nov. 9, 1910, at 1, col. 7.

67. The state constitutions of Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia, and Wisconsin do not expressly require either indictments or informations before criminal prosecutions may commence.

68. DeGoyler v. Commonwealth, 314 Mass. 626, 627, 51 N.E.2d 251, 252 (1943)(12th Article of Mass. Declaration of Rights requires indictments for all felony prosecutions); *see* State v. Hastings, 120 N.H. 454, 455, 417 A.2d 7, 8 (1980) (all felonies in New Hampshire must commence on indictment).

Appellate courts in Georgia, Kansas, Maryland, Michigan, Minnesota, Vermont, Virginia, and Wisconsin have held that their state constitutions allow either indictments or informations. *See* Moody v. State, 145 Ga. App. 734, 245 S.E.2d 40, (1978); Zimmer v. State, 206 Kan. 304, 311, 477 P.2d 971, 978 (1970); Heath v. State, 198 Md. 455, 464, 85 A.2d 43, 47 (1951); *In Re* Palm, 255 Mich. 632, 635, 238 N.W. 732, 733-34 (1931), *cert. denied sub nom.* Palm v. Jackson, 285 U.S. 547 (1932); State v. Keeney, 153 Minn. 153, 155, 189 N.W. 1023, 1024 (1922); State v. Barr, 126 Vt. 112, 116-17, 223 A.2d 462, 466 (1966); Scales v. Commonwealth, 214 Va. 728, 730, 204 S.E.2d 273, 276 (1974), *cert. denied*, 419 U.S. 1123 (1975); Rowan v. State, 30 Wis. 129, 144-45, 11 Am. Rep. 559 (1872).

of informations and indictments, four mandate indictments for all crimes,[69] ten require indictments for felony prosecutions,[70] and three demand indictments only for capital offenses;[71] sixteen state constitutions specifically allow either informations or indictments in all cases,[72] and seven expressly authorize the state legislature to alter, modify, or abolish the grand jury.[73]

Arizona's constitution is one of the sixteen which specifically authorize prosecution upon indictment or information.[74] But the constitutional provision is sparse, and one must look to statutes and case law to fill in the missing details.

Arizona's Statutory Framework and Current Grand Jury Practice

By definition, a grand jury consists of twelve to sixteen[75] qualified[76] persons impanelled[77] by the presiding judge of the county superior court and sworn to investigate into alleged public offenses and governmental corruption.[78] While the prosecutor's use of the grand jury is optional, each presiding judge of Pima and Maricopa counties must summon a grand jury at least three times each year.[79] The jury's term usually lasts for 120 days unless the jury is involved in unfinished business.[80] Jurors must inquire into all allegations that the prosecutor presents. In addition, juries may present their own allegations to the prosecutor or judge, but they cannot make official inquiries unless the prosecutor presents the case to the jury as a whole.[81]

In a typical grand jury impanelment, the impanelling judge asks the potential jurors questions regarding their qualifications and gives them legal

69. N.J. CONST. art. I, par. 8 (petty offenses are exempt from this provision since they are not considered crimes. New Jersey v. Senno, 79 N.J. 216, 398 A.2d 873 (1979)); S.C. CONST. art. I, § 11 (except offenses carrying fines of $200 or less, or sentences of imprisonment of 30 days or less); TENN. CONST. art. 1, § 14; W. VA. CONST. art. 3, § 4.

70. ALA. CONST. art. I, § 8 and amend. no. 37; ALASKA CONST. art. I, § 8; DEL. CONST. art. I, § 8; KY. BILL OF RIGHTS § 12; ME. CONST. art. 1, § 7; MISS. CONST. art. 3, § 27; N.Y. CONST. art. 1, § 6; N.C. CONST. art. I, § 22; OHIO CONST. art. I, § 10; TEX. CONST. art. 1, § 10.

71. FLA. CONST. art. 1, § 15; LA. CONST. art. 1, § 15; R.I. CONST. art. I, § 7 and art. XL of amendments.

72. ARIZ. CONST. art. II, § 30; ARK. CONST. art. 2, § 8 and amend. no. 21; CAL. CONST. art. 1, § 14; CONN. CONST. art. 1, § 8 and amending art. 17; HAWAII CONST. art. I, § 10 as amended; IDAHO CONST. art. 1, § 8; MO. CONST. art. 1, § 17; MONT. CONST. art II, § 20; NEV. CONST. art. 1, § 8; N.M. CONST. art. II, § 14; OKLA. CONST. art. 2, § 17; OR. CONST. amend. art. VII, § 5; PA. CONST. art I, § 10; UTAH CONST. art. I, § 13; WASH. CONST. art. 1, § 25; WYO. CONST. art. 1, § 13.

73. COLO. CONST. art. II, § 8; ILL. CONST. art 1, § 7; IND. CONST. art. 7, § 17 as amended; IOWA CONST. art. 1, § 11 and amend. no. 3 of 1884; NEB. CONST. art. I, § 10; N.D. CONST. art. I § 10; S.D. CONST. art. VI, § 10.

74. *See supra* note 1 for the text of ARIZ. CONST. art. II, § 30.

75. ARIZ. REV. STAT. ANN. §§ 21-101, 21-201 (Supp. 1986).

76. To be qualified as a juror one must be at least eighteen years of age and an elector of the county in which the jury sits. *Id.* at § 21-201. For the qualifications of an elector, *see id.* at § 16-101 (1980).

77. See *infra* notes 82-87 and accompanying text for a discussion of the impanelment procedure.

78. ARIZ. REV. STAT. ANN. § 21-401(2) (Supp. 1986).

79. *Id.* at § 21-402(A). These two counties are the only Arizona counties with a population of 200,000 or more. THE WORLD ALMANAC AND BOOK OF FACTS 1987 at 258 (1986).

80. ARIZ. REV. STAT. ANN. § 21-403 (Supp. 1986).

81. *Id.* at § 21-407 (1975).

instructions.[82] The questions seek to uncover any biases or prejudices prospective jurors may have regarding either the state or criminal defendants generally.[83] The judge informs the jurors about their legal duties and rights as grand jurors and the grounds for which they must disqualify themselves in any particular case.[84]

Usually the judge stresses the grand jury's role in the criminal justice system as involving only a finding of probable cause and not proof beyond a reasonable doubt.[85] Further, the judge ordinarily emphasizes to the grand jurors that they are independent of the prosecutor; that if they believe no probable cause exists, they may refuse to indict or demand additional evidence or testimony; and that they may amend the prosecutor's indictment.[86] After the judge finishes the impanelling process, he appoints a foreman and a vice-foreman.[87]

After impanelment, the judge releases the jury into the prosecutor's custody. By statute, the prosecutor is to "attend" the jury at the jury's request, and must examine witnesses before the jury even if not so requested; he is also the jury's legal advisor, although the jury may seek legal advice from the judge as well.[88] The prosecutor's instructions on the law usually commence with definitions of legal terms, common crimes, prerequisites for criminal liability, and standard grand jury operating procedure.[89]

After the preliminary instructions, the prosecutor may call several witnesses to testify about issues and procedures the grand jury will probably encounter during their inquiries.[90] Eventually, the prosecutor usually

82. *Id.* at § 21-409. *See generally, e.g.*, Impanelment of the 76th Pima County Grand Jury (Sept. 17, 1986) [hereinafter Impanelment, GJ-76].

83. ARIZ. R. CRIM. P. 12.1(b).

84. Jurors are disqualified if they are witnesses, interested "directly or indirectly in the matter under investigation," related to either party, or generally biased or prejudiced. *Id.* 12.1(d) and 12.2.

85. *E.g.*, Impanelment, GJ-76, *supra* note 82, at 3-4; N. AMES & D. EMERSON, *supra* note 6, at 88; State v. Baumann, 125 Ariz. 404, 610 P.2d 38 (1980).

86. *E.g.*, Impanelment, GJ-76, *supra* note 82, at 37-39; Marston's Inc. v. Strand, 114 Ariz. 260, 560 P.2d 778 (1977) (independence); Crimmins v. Superior Court, 137 Ariz. 39, 44, 668 P.2d 882, 887 (1983) (Feldman, J., specially concurring) (additional evidence), *see also* ARIZ. R. CRIM. P. 12.1(d)(5); Baines v. Superior Court, 142 Ariz. 145, 152, 688 P.2d 1037, 1044 (Ct. App. 1984) (power to amend indictments); N. AMES & D. EMERSON, *supra* note 6, at 90-91.

87. ARIZ. REV. STAT. ANN. § 21-409(D) (1975). At times, the prosecutor will ask the court appointed foreman to appoint jurors to serve as grand jury clerk and as bailiff. *See e.g.*, Proceedings before the Pima County Grand Jury No. 76, Grand Jury Instructions 8-9 (Sept. 17, 1986) [hereinafter Proceedings, GJ-76, Instructions (Sept. 17, 1986)]. Authority for these additional grand jury officers is found in ARIZ. R. CRIM. P. 12.4(a).

88. ARIZ. REV. STAT. ANN. §§ 21-408(A) and 21-409(C) (1975). Resort to judicial legal advice is rare. N. AMES & D. EMERSON, *supra* note 6, at 102.

89. N. AMES & D. EMERSON, *supra* note 6, at 93. Also, *see generally, e.g.*, Proceedings before the Pima County Grand Jury No. 76 *in re*: Reading, Explanation, and Demonstrations of Various Statutes... (Sept. 18, 1986) and Proceedings before the Pima County Grand Jury No. 76, Grand Jury Instructions (Sept. 19, 1986).

90. These witnesses may be personnel from the county medical examiner's office, or a law enforcement officer specializing in a certain field. *E.g.*, Proceedings before the Pima County Grand Jury No. 76, Presentation by the Office of the Medical Examiner (Sept. 26, 1986) [hereinafter Proceedings, GJ-76 (Sept. 26, 1986)] and Proceedings before the Pima County Grand Jury No. 74, Explanation and Demonstration on Narcotics, Marijuana, & Dangerous Drugs (June 6, 1986) [hereinafter Proceedings, GJ-74 (June 6, 1986)].

The stated purpose of these presentations and demonstrations is to familiarize the jurors with typical law enforcement operating procedures. *E.g.*, Proceedings, GJ-74 (June 6, 1986), *supra*, at 7; Proceedings, GJ-76 (Sept. 26, 1986), *supra*, at 7-8. Some Pima County defense attorneys believe that

presents hypothetical cases[91] which enable the jurors to practice their roles and acquaint the foreman with his "scripts."[92]

Statutes and a rule of criminal procedure require that *all* proceedings before the grand jury be kept secret.[93] An official court reporter, however, attends all proceedings and is sworn to make a complete and accurate transcription of the proceedings except the jurors' deliberations.[94] The official transcript is filed with the clerk of the superior court within twenty days of any indictment; the transcript is available only to the county attorney's office and the defense counsel.[95]

The standard grand jury presentation begins with the prosecutor or a grand jury officer calling the case by the docket number and suspect's[96] name. The prosecutor then proceeds to call his witness and examine him before the jury.[97] Because the Arizona Rules of Evidence do not apply in Arizona grand jury proceedings,[98] the witness—often a law enforcement officer— merely reads from his notes, telling the grand jury the basic facts comprising the state's case against the suspect.[99]

Once the prosecutor finishes with his examination, the foreman asks the jurors if they have any questions.[100] Occasionally a juror will ask the witness a legal question and the prosecutor will interrupt and remind the juror that he, and not the witness, is the jury's legal advisor.[101] Also, jurors may ask questions which the prosecutor will consider prejudicial and irrelevant to a finding of probable cause, and the prosecutor will then forbid the witness from answering the offensive question and attempt to explain to the jury why the question is improper.[102]

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the demonstrations, particularly those related to narcotics, are designed merely to inflame the grand jury against putative indictees suspected of narcotics offenses. See *infra* note 140 and accompanying text.

91. *E.g.*, Proceedings before the Pima County Grand Jury No. 72, Explanation of Statutes (Jan. 29, 1986) at 4.

92. *E.g.*, Proceedings before Pima County Grand Jury No. 72, Explanation of Statutes, (Jan. 24, 1986) 3.

93. ARIZ. REV. STAT. ANN. §§ 13-2812, 2813 (1978) declare that any unlawful disclosure of grand jury testimony or of an indictment is a class 2 misdemeanor. ARIZ. R. CRIM. P. 12.5 authorizes the presence of only the prosecutor, court reporter, testifying witness, and jurors during grand jury sessions. Only grand jurors are present during deliberations. *Id. See also supra* note 23.

94. ARIZ. REV. STAT. ANN. § 21-411 (1975).

95. ARIZ. R. CRIM. P. 12.8(c).

96. N. AMES & D. EMERSON, *supra* note 6, at 92. Regularly in Pima County the prosecutor will refer to the proposed indictment as simply the indictment and the putative defendants as the accused or defendants rather than as suspects. *See id.* at 93. This practice raises the possibility that the prosecutor is already coloring the jurors' minds against the suspects and, thus, subverting the grand jury's function of making independent determinations of probable cause. In contrast, the prosecution in Maricopa County takes "strict precautions" to avoid the use of prejudicial language before the grand jury. *Id.*

97. *See infra* notes 134-36 and accompanying text; *see, e.g.*, Proceedings before the Pima County Grand Jury No. 74, G.J. Case No. 74-GJ-212 (July 11, 1986). [hereinafter Proceedings, 74-GJ-212].

98. ARIZ. R. EVID. 1101(d); N. AMES & D. EMERSON, *supra* note 6, at 95; State v. Guerrero, 119 Ariz. 273, 580 P.2d 734 (Ct. App. 1978).

99. N. AMES & D. EMERSON, *supra* note 6, at 95-96. *See also infra* notes 134-36 and accompanying text.

100. *E.g.*, Proceedings, 74-GJ-212, *supra* note 97, at 8.

101. N. AMES & D. EMERSON, *supra* note 6, at 101.

102. *Id.* at 100.

After the jury concludes its questioning, the witness is excused and asked to wait outside the grand jury room should additional testimony be needed.[103] The prosecutor then asks the grand jury if they have any case-specific legal questions.[104] After answering these questions, the prosecutor and reporter leave the jurors so that they may deliberate.[105]

After deliberating, the jurors call the prosecutor and reporter back and reveal how they voted.[106] Or, the jury may demand that the prosecutor produce additional evidence or witnesses.[107] If nine of the jurors find probable cause, a "true bill" is returned and the defendant stands formally indicted.[108] After completing the cases for the day the jury appears in open court where the foreman informs the judge of the returned indictments.[109] The grand jury's job is then complete.

Challenging the Grand Jury Proceedings

The Arizona Rules of Criminal Procedure provide the accused with a method to challenge grand jury proceedings *before* trial.[110] Rule 12.9 allows a defendant to move the court for a redetermination of probable cause if the accused establishes that he was denied a substantial procedural right.[111] The accused must file this motion within twenty-five days of the filing of the grand jury transcript unless a timely motion for extension is made and granted.[112]

A "twelve nine" motion may be used to challenge an indictment on several grounds. The motion may challenge an individual juror if there is evidence suggesting that the juror should have been disqualified; it may challenge the grand jury proceedings if the proceedings were not fully recorded; it may challenge the prosecutor's behavior if such behavior invaded the grand jury's province or independence; and it may also challenge other prosecutorial misconduct.[113]

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103. *Id.* at 101 n.1.
104. *Id.* at 101.
105. *See, e.g.*, Proceedings, 74-GJ-212, *supra* note 97, at 9.
106. *See id.*
107. *See supra* note 86 and accompanying text.
108. ARIZ. REV. STAT. ANN. § 21-414 (1975).
109. *Id.* at § 21-415; *see, e.g.*, Impanelment, GJ-76, *supra* note 82, at 26.
110. A defendant cannot challenge the grand jury proceedings by appeal after conviction where errors in the grand jury proceeding had no effect on the subsequent trial. State v. Just, 138 Ariz. 534, 541-42, 675 P.2d 1353, 1360-61 (Ct. App. 1984). *See also* State v. Rodriguez, 145 Ariz. 157, 168, 700 P.2d 855, 866 (Ct. App. 1984) (citing Maule v. Superior Court, 142 Ariz. 512, 690 P.2d 813 (Ct. App. 1984) and State v. Neese, 126 Ariz. 499, 616 P.2d 959 (Ct. App. 1980) (trial court's denial of motion for remand for redetermination of probable cause challengeable only by special action proceedings); State v. Smith, 123 Ariz. 243, 247-48, 599 P.2d 199, 203-04 (1979) (defendant waives objection to grand jury proceedings by failure to comply with ARIZ. R. CRIM P. 12.9 timeliness requirements).
111. The evidence for any violation of the accused's rights comes from the grand jury transcript. Rule 16.5(b) also allows a defendant to challenge the indictment but only on the grounds that the indictment is "insufficient as a matter of law." ARIZ. R. CRIM. P. 16.5(b). These grounds do not apply to grand jury proceedings *per se*, but only to an indictment that "fails to apprise the defendant of the crime charged, is indefinite, or fails to protect him from [double jeopardy]." State v. Young, 149 Ariz. 580, 587, 720 P.2d 965, 972 (Ct. App. 1986).
112. ARIZ. R. CRIM. P. 12.9(b); *Maule*, 142 Ariz. at 515, 690 P.2d at 816.
113. N. AMES & D. EMERSON, *supra* note 6, at 108-09; State v. Superior Court, 102 Ariz. 388, 430 P.2d 408 (1967); 17A ARIZ. REV. STAT. ANN., ARIZ. R. CRIM. P. 12.9 (comment thereto

Besides providing a possibility of having an indictment remanded to the grand jury for reconsideration, the preparation and filing of a 12.9 motion allows a defense attorney to take action soon after the grand jury hands down an indictment. This gives defense counsel a number of benefits. It gives defense counsel an opportunity to seize psychological and scheduling control over the case. It forces defense counsel to get involved at an earlier, possibly more critical, stage of representation, thus forcing counsel to develop a coherent case strategy early on. It enables defense counsel to educate judges and prosecutors about weaknesses in the state's case. And, it allows defense counsel to demonstrate to the client that progress is being made on the case.[114]

Besides proceeding under Rule 12.9, an accused may move the court to invoke its "supervisory power" over the grand jury to dismiss an indictment, with or without prejudice, tainted by prosecutorial misconduct. In *State v. Young*,[115] the Arizona Court of Appeals held that the courts have the power to dismiss an indictment with prejudice if the indictment "is the result of a violation of due process."[116] In *Young*, however, the prosecutorial misconduct did not reach the level necessary to justify the trial court's dismissal with prejudice.[117]

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regarding challenges to jurors); Wilkey v. Superior Court, 115 Ariz. 526, 566 P.2d 327 (Ct. App. 1977) (unrecorded proceedings); Crimmins v. Superior Court, 137 Ariz. 39, 668 P.2d 882 (1983) (misconduct); *Young*, 149 Ariz. 580, 720 P.2d 965 (Ct. App. 1986) (misconduct).

114. Remarks by Dennis R. Murphy before the Arizona Attorneys for Criminal Justice at an Advanced Trial Skills Seminar in Tucson, Arizona, on April 10, 1987.

115. 149 Ariz. 580, 720 P.2d 965 (Ct. App. 1986).

116. *Id.* at 586, 720 P.2d at 971. The court's opinion can be read narrowly as holding that a dismissal *with prejudice* is appropriate only when "the evidence is irrevocably tainted or there exists a pattern of [prosecutorial] misconduct that is prevalent or continuous." *Id.* at 585, 720 P.2d at 970; *see also id.* at 587, 720 P.2d at 972 (Kleinschmidt, J., specially concurring.) But, there is a reasonable and more liberal interpretation that can be ascribed to *Young*. The narrow language quoted *supra* only speaks to the court's interpretation of the cited federal cases. Later in the opinion, the court declares that a "court can dismiss *with prejudice* an indictment which is the result of a violation of due process." *Id.* at 586, 720 P.2d at 971 (emphasis added). Thus, the court may be moving away from the federal standard for a dismissal with prejudice—irrevocable taint or pattern of misconduct—and enunciating a more liberal policy for the exercise of the supervisory power—any due process violation.

117. County prosecutors had abruptly ended one grand jury presentation and instituted a second identical presentation before a concurrently sitting grand jury. The prosecutors did this when the first grand jury asked questions relating to evidence previously ruled inadmissible, called for appearances by the defendant and other witnesses, and demanded additional evidence. The trial court dismissed the indictment because it considered the prosecutors' actions improper. The court of appeals agreed that the prosecutors' conduct was improper (although not improper enough to justify dismissal with prejudice), citing the principle of the grand jury's independence from the prosecutor in deciding what evidence it shall examine and what charges, if any, it will return. *Id.* at 582-85, 720 P.2d at 967-70.

The value of dismissing an indictment with prejudice when the indictment is tainted with prosecutorial misconduct lies not in doing justice in the particular case, "but rather in a desire to maintain proper prosecutorial standards generally." *Thibadeau*, 671 F.2d 75, 78 (2d Cir. 1982).

For federal cases supporting the dismissal of indictments based on the court's supervisory power, *see generally* United States v. Thibadeau, 671 F.2d 75 (2d Cir. 1982); United States v. Cederquist, 641 F.2d 1347 (9th Cir. 1981); United States v. Brown, 602 F.2d 1073 (2d Cir. 1979), *cert. denied*, 444 U.S. 952 (1979); United States v. Samango, 607 F.2d 877 (9th Cir. 1979); United States v. Serubo, 604 F.2d 807 (3d Cir. 1979); United States v. Owens, 580 F.2d 365 (9th Cir. 1978); United States v. Fields, 592 F.2d 638 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); Coppedge v. United States, 311 F.2d 128 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963); United States v. Lawson, 502 F. Supp. 158 (D. Md. 1980).

INDEPENDENCE: THE PRACTICAL PROBLEMS

Within the framework described above, it is questionable whether the Arizona county grand jury can function as an independent body capable of making free and uninfluenced determinations of probable cause. The seriousness of grand jury accusations demand that the legal framework allow the grand jury to operate independently.

Grand Jury accusations will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo.[118] A non-indigent accused's attorney's fees will mount up even before actual trial begins.[119] The media may report on the indictment and disseminate it throughout the community, especially if the accused is a public figure. The resulting damage to the accused's reputation can create severe financial loss which would compound the impact of legal fees. In addition, one must consider the psychological stress of being the target of criminal prosecution.[120] Even if an accused is acquitted at trial, the economic, social and psychological consequences will follow a person through life.

To avoid the unjust imposition of these devastating results, an effective pre-trial screening process is necessary to reduce the likelihood of wrongful accusation. Currently, there are several prevalent forms of pre-trial screening: pure prosecutorial discretion (the prosecutor has unlimited discretion in bringing formal charges against suspects), preliminary examination, and grand jury accusation.[121] The first option, pure prosecutorial discretion, is valid because federal due process does not require a finding of probable cause before an individual must stand trial.[122] But society should not allow a single individual—the prosecutor—to decide who should or should not stand trial, considering the obvious possibilities for political and personal harassment.

The preliminary hearing, while serving as a curb on prosecutorial discretion, eliminates the citizenry from decisions regarding prosecution. A preliminary hearing, while offering suspects more legal protection than the other alternatives,[123] is presumably expensive.[124] Additionally, a preliminary hearing subjects an individual to all the social and psychological traumas associated with an adversarial proceeding.

Pre-trial screening by an independent grand jury meets most of these objections. Because grand jury proceedings are not adversarial in nature, attorney's fees are likely to be lower than cases involving preliminary exami-

118. *Serubo*, 604 F.2d at 817, *cited with approval*, Crimmins v. Superior Court, 137 Ariz. 39, 44, 668 P.2d 882, 887 (1983) (Feldman, J., specially concurring).

119. Retained counsel will undoubtedly charge fees for pre-trial court appearances and plea bargaining negotiations. If the attorney makes any pre-trial motions, research and writing costs will escalate.

120. *See* Holmes & Rahe, *The Social Readjustment Rating Scale*, 11 J. Psychosomatic Res. 213-18 (1967) (mental stress related to accusation of crime).

121. *See* N. AMES & D. EMERSON, *supra* note 6, at 3-6.

122. *See supra* notes 49-51 and accompanying text.

123. For example, cross examination of witnesses, presentation of all exculpatory evidence, the right to counsel in all phases of the proceedings, and an impartial judge.

124. Preliminary hearings generally take about thirty to forty-five minutes. N. AMES & D. EMERSON, *supra* note 6, at 51-52. Thus, an attorney is more likely to charge a premium for courtroom time in addition to the preparation for the adversarial-style proceeding.

nations.[125] But, more importantly, the grand jury replaces the prosecutor as the final determiner of who shall stand trial. If the grand jury is truly independent and impartial, and if the prosecutor presents the evidence in a fair manner, then it would seem that society is doing all that is reasonable to ensure that the burden of having to stand trial is fairly imposed.

Despite the stated goal of grand jury independence, the system itself tends to subtly, and sometimes not so subtly, undermine the grand jury's independence. The fact that the grand jury acts under the dominance[126] of the county attorney's office supports this proposition.

The current statutory system fosters this domination in several ways. First, the prosecutor is the jury's primary legal advisor.[127] But the prosecutor is also prosecuting the very case on which he is advising the grand jury, causing an inherent conflict of interest.[128] The law demands that the prosecutor give the jury fair legal advice,[129] yet the prosecutor is also charged with the duty of convincing the jurors that the suspect ought to stand trial.

The prosecutor's heavy reliance on pre-prepared indictments[130] also contributes to his dominance over the grand jury. Before presenting the state's case, the prosecutor gives the grand jury a proposed indictment[131] which names the suspect as the "defendant," lists the statutes the suspect allegedly violated, and gives the essential facts supporting the state's case.[132] Despite the impanelling judge's instructions that the jurors are to amend the indictment if they find that any portion lacks probable cause, jurors tend to accept the proposed indictment as a unified document and are rarely willing to change portions of it.[133]

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125. *See supra* notes 123-24 and accompanying text.

126. Dominance is not too strong a word here. The grand jury as originally devised consisted of the best men or knights of the county—the leaders of the county. These citizens were better suited to meet the crown's prosecutor on the same social, political, and intellectual level, and were unlikely to see the prosecutor as an authority figure. Today, grand juries are composed of average citizens who must face the government official and his talents as a trained advocate and litigator. Thus, today's jurors are more likely to see the county prosecutor as an authority figure and may be less willing or able to resist an authoritative plea to indict. *See generally* S. MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).

127. ARIZ. REV. STAT. ANN. § 21-408 (1975); N. AMES & D. EMERSON, *supra* note 6, at 102; *see also* Crimmins v. Superior Ct., 137 Ariz. 39, 44-45, 668 P.2d 882, 887-88 (1983) (Feldman, J., specially concurring).

128. D. EMERSON, *supra* note 6, at 31.

129. State v. Superior Court, 139 Ariz. 422, 425, 678 P.2d 1386, 1389 (1984); *Crimmins*, 137 Ariz. 39, 668 P.2d 882; Baines v. Superior Court, 142 Ariz. 145, 152, 688 P.2d 1037, 1044 (Ct. App. 1984).

130. N. AMES & D. EMERSON, *supra* note 6, at 102; *see, e.g.*, Impanelment, GJ-76, *supra* note 82, at 37.

131. N. AMES & D. EMERSON, *supra* note 6, at 102. In contrast, in Maricopa County the grand jury does not receive the draft indictment until after they have been reminded of their ability to recall witnesses, request additional evidence, or ask the prosecutor for a draft indictment.

132. A hypothetical example of a single count indictment is as follows:

> The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse JOHN JAY JONES and charge that in Pima County:
>
> COUNT ONE (FIRST DEGREE MURDER, A CLASS ONE FELONY)
>
> On or about the 28th day of August, 1987, JOHN JAY JONES murdered VINCENT VAN SMITH, in violation of A.R.S. §§ 13-1105, 13-703 and 13-710.

133. N. AMES & D. EMERSON, *supra* note 6, at 108. The authors' research shows that only in one case did the jurors amend the pre-prepared indictment, and this was only because the jurors

Prosecutorial reliance on hearsay evidence[134] also undermines the grand jury's independence, preventing the grand jury from assessing the credibility of the state's evidence. The state's presentation usually consists of a single law enforcement officer reading from his notes.[135] Without any cross- examination by the defense, or even critical questions propounded by an impartial person, weak points in the state's case, which if highlighted may dissuade the jury from finding probable cause, are likely to go unchallenged. The jurors, who ideally are supposed to fill the shoes of the critical examiner, tend to ask very few, if any, questions.[136]

Added to these structural deficiencies is the jurors' personal dependence on the prosecutor's office. Jurors who must take time off from their jobs without pay are told to contact the county attorney's office if any employment related problems arise.[137] The prosecutor also handles food, parking, and other administrative problems that the individual juror has as a result of his or her jury duty.[138] Potentially, the jurors may come to depend on the county attorney's office throughout their term, and begin to look upon the prosecutor as a friend they can believe and trust instead of one who must be eyed critically.[139] A proper statutory system ought to minimize the possibilities of such dependence which could interfere with the jurors' independent judgment.

The *ex parte* nature of grand jury proceedings further enhances the potential for prosecutorial abuse of the grand jury. In an *ex parte* proceeding there is little to restrain an over-zealous prosecutor who makes prejudicial remarks capable of diverting the grand jury from its historic role as a barrier between the state and the citizen.[140]

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misunderstood the law. The indictment was subsequently re-amended to conform to the original pre-prepared indictment.

134. *Id.* at 95.

135. *Id.* at 95-96. *See supra* notes 98-99 and accompanying text.

136. Typically, one or two jurors will only ask a question or two. *Id.* at 100.

137. *See* Impanelment and General Instructions, Before the Pima County Grand Jury Number 74 (May 23, 1986) at 73-75.

138. Impanelment, GJ-76, *supra* note 82, at 56-57.

139. *See supra* notes 126, 133-38 and accompanying text.

140. *See infra* notes 150-52 and accompanying text. In Pima County, such prejudicial diatribes seem to happen with disturbing regularity. *See generally* Supplemental Memorandum in Support of Motion to Dismiss, State v. Flores, Pima Cty. Super. Ct., CR-19285 (filed Nov. 24, 1986).

An outrageous example of such prejudicial diatribes was heard before the 74th Pima County Grand Jury on June 6, 1986. In a so-called "Explanation and Demonstration on Narcotics & Dangerous Drugs," the State's witness said,

> One of the smuggling techniques is they'll take a small toddler, two or three year old child and kill it, they'll then open the back of that child with a knife, disembowel the body cavity, and then pack the body cavity with morphine base, wrap it in a blanket, put it in the arms of a woman and have her walk that child across the border like that child is asleep. Now, that's a known smuggling technique, so that's what people are doing to get us our heroin.

Motion to Dismiss or Remand, State v. Grosenick, Pima Cty. Super. Ct., CR-18397 (filed Aug. 18, 1986) (quoting from Proceedings, GJ-74 (June 6, 1986), *supra* note 90, at 76.

The usual judicial remedy for such remarks is to remand the indictment for a new determination of probable cause. *See* State v. Good, 10 Ariz. App. 556, 460 P.2d 662 (1969). The prosecutor's prejudicial remarks may go beyond the individual defendant, by making the jurors fear for their own lives and property, or believing that the defendant is responsible for a whole host of crimes not mentioned in the indictment. *E.g.*, Proceedings, GJ-74 (June 6, 1986), *supra* note 90, at 84. A prosecutor may also materially mislead the grand jury by overemphasizing a particular point, or by

Failure to present the grand jury with clearly exculpatory evidence[141] is another form of prosecutorial misconduct before the grand jury. Currently, it is the prosecutor who initially determines what evidence is clearly exculpatory. If he decides that the exculpatory nature of the evidence is less than clear, then he is under no obligation to present it to the jury unless the jury requests it.[142] Thus, the grand jury is prevented from exercising its unfettered judgment as to what is or is not clearly exculpatory evidence. This situation again constitutes a conflict of interest for the prosecuting attorney. Obligating the prosecutor to make all exculpatory evidence known to the grand jury or at least allowing a third neutral party to decide what is clearly exculpatory is the better practice.

Inordinate time pressures also undermine the grand jury's independence. A grand jury only sits one to two days a week,[143] usually processing one case every ten to fifteen minutes, resulting not in a deliberative body, but in a time-pressured body anxious to get home.[144] Time pressures, even if subtle and self-imposed, impair independent judgment.

Judicial Attempts to Protect Grand Jury Independence

This combination of structural flaws has resulted in a reduction in the grand jury's usefulness as an independent determiner of probable cause. In response, the Arizona judiciary has attempted to protect the grand jury's independence from prosecutorial invasion.[145] The courts' efforts deal primarily with prosecutorial abuse of the grand jury rather than with the statutory flaws in the grand jury system.[146]

In *Corbin v. Broadman*[147] the Arizona Court of Appeals sustained the quashing of an indictment, holding that an attending prosecutor, who should have disqualified himself because of a conflict of interest, was an unauthorized person and as such should not have attended the grand jury proceedings.[148] The court held that because the presence of unauthorized persons so

misstating or omitting relevant instructions. *See* Motion to Dismiss or Remand, State v. Harbour, Pima Cty. Super. Ct., CR-16248 at 7-8 (filed July 24, 1986); *and see* Crimmins v. Superior Court, 137 Ariz. 39, 668 P.2d 882 (1983); Nelson v. Roylston, 137 Ariz. 272, 669 P.2d 1349 (Ct. App. 1983).

141. The Arizona Supreme Court defines clearly exculpatory evidence as any evidence which if presented to the grand jury would deter it from returning a true bill. State v. Superior Court, 139 Ariz. 422, 425, 678 P.2d 1386, 1389 (1984) (citation omitted).

142. *See infra* note 170 and accompanying text.

143. Impanelment, GJ-76, *supra* note 82, at 50.

144. Proceedings Before the Pima County Grand Jury Number 76, Grand Jury Procedural Instructions (Oct. 1, 1986) at 4-5.

145. On the issue of the grand jury's independence from the prosecutor, *see generally, e.g.*, United States v. Al Mudarris, 695 F.2d 1182 (9th Cir. 1983); United States v. Chanen, 549 F.2d 1306 (9th Cir. 1977); State v. Superior Ct., 102 Ariz. 388, 430 P.2d 408 (1967); State v. Good, 10 Ariz. App. 556, 460 P.2d 662 (1969).

146. Judicial control of grand jury abuse has a "long history" in Arizona. State v. Young, 149 Ariz. 580, 586, 720 P.2d 965, 971 (Ct. App. 1986).

The courts' holdings are aimed at defining prosecutorial grand jury abuse and can be classified into four general categories: unauthorized persons, improper prosecutorial comments to the grand jury, prosecutorial respect for the jury's independence and procedures, and unfair presentations of law and facts.

147. 6 Ariz. App. 436, 433 P.2d 289 (1967).

148. *Id.* at 442, 433 P.2d at 295.

tainted the proceedings, quashing the indictment required no showing of actual prejudice to the defendant.[149]

The court of appeals again sustained a lower court in its quashing of an indictment in *State v. Good*.[150] Here, the court found that a prosecutor's "exhortations and factual interpretations" constituted an attempt to improperly influence the grand jury, thus, interfering with its right to "act free from sway or control from any source."[151] The court, citing *Corbin*, also held that the defendant need not show that the grand jury was, in fact, influenced by the prosecutor's remarks; prosecutorial comments aimed at inflaming and improperly influencing the grand jury are a denial of due process and require quashing the indictment.[152]

The Arizona courts have also sought to protect the grand jury's independence from prosecutorial evasion of proper grand jury procedure. An example is *Gershon v. Broomfield*,[153] which applied the principle that all of the prosecutor's investigatory powers derive from the grand jury.[154] The supreme court held that it was violative of the grand jury's independence for a prosecutor to issue a subpoena without prior grand jury authorization.[155]

State v. Superior Court (Soto)[156] is another example of the judiciary's jealous protection of grand jury procedures. In *Soto*, the prosecutor gave the grand jury off-the-record legal instructions and engaged in other off-the-record conversations.[157] The court of appeals ruled that the statute mandating transcription of all proceedings before the grand jury was to be strictly enforced, the defendant need not show any prejudice,[158] and the only effective

149. *Id.* But when a defendant challenges grand jury proceedings *after conviction*, the defendant must show actual prejudice resulting from any error in the proceedings. *Young*, 149 Ariz. at 585, 720 P.2d at 970. *Cf.* State v. Just, 138 Ariz. 534, 675 P.2d 1353 (Ct. App. 1984); *see supra* note 110 and accompanying text.

150. 10 Ariz. App. 556, 460 P.2d 662 (1969).

151. *Id.* at 559, 460 P.2d at 665. The prosecutor's comments are found at *id.* at 558-59, 460 P.2d at 664-65.

152. *Id.* at 559-560, 460 P.2d at 665-66. *Cf.* United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1392 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984) (defendant must show actual prejudice). Some remarks, however, do not rise to the level of a due process violation. *See* State v. Bojorquez, 111 Ariz. 549, 535 P.2d 6 (1975) (prosecutor's remarks reflecting personal beliefs, while erroneous, not sufficient to warrant reversal of conviction); *and* State v. Hocker, 113 Ariz. 450, 556 P.2d 784 (1976) (same), *disapproved of on other grounds*, State v. Jarzab, 123 Ariz. 308, 599 P.2d 761 (1979).

153. 131 Ariz. 507, 642 P.2d 852 (1982). In *Gershon*, the petitioner filed a special action challenging an assistant attorney general's issuance of a subpoena without the state grand jury's consent. *Id.* at 508, 642 P.2d at 853.

154. *Id.* at 510, 642 P.2d at 855.

155. *Id.* at 510; and at 511-12, 642 P.2d at 855; and at 856-57 (Feldman, J., specially concurring). While *Gershon* dealt with the state attorney general and the State Grand Jury, the opinion points out that the applicable subpoena statutes applied to all criminal procedures, and that the attorney general attending the state grand jury would have the same obligations as a county attorney attending the county grand jury. *Id.* at 508-09, 642 P.2d at 853-54.

In 1982, the same year *Gershon* was decided, the Arizona Legislature authorized state prosecutors to issue subpoenas without prior grand jury approval, provided, *inter alia*, that a legal grand jury is in existence at the time of issuance, and that the prosecutor made timely notifications to the grand jury foreman and the presiding superior court judge. ARIZ. REV. STAT. ANN. § 13-4071 (Supp. 1986).

156. 26 Ariz. App. 482, 549 P.2d 577 (1977). In *Soto*, the court of appeals rejected the state's special action challenge to a trial court's remand of an indictment. *Id.*

157. The facts of *Soto* appear at 26 Ariz. App. at 483, 549 P.2d at 578.

158. *Id.* at 484-85, 549 P.2d at 579-80.

remedy was a remand of the indictment.[159]

The manner in which the prosecutor instructs the grand jury on the applicable law, or relates the operative facts, has also come under the scrutiny of the Arizona courts. *Crimmins*,[160] *Nelson v. Roylston*,[161] and *State v. Superior Court (Mauro)*[162] are leading cases in this area.

In *Crimmins*, a kidnapping and assault prosecution, the prosecutor failed to instruct the grand jury on applicable statutes and allowed a prosecution witness to testify in a misleading manner.[163] Furthermore, the prosecutor ignored the defendant's willingness to come forward and explain his side of the incident. The supreme court held that the prosecutor has a duty to introduce evidence in a "fair and impartial presentation"[164] and a duty to instruct the grand jury on all the applicable law as determined by the facts of the case, even if the grand jury does not make any specific request for additional legal instructions.[165]

In *Nelson*, grand jurors asked the state's witness if he had any information about the suspect's mental state at the time of the alleged offense.[166] The witness responded negatively. But in fact, the witness had information that the suspect was seeing a psychiatrist, and that there was some medical evidence available suggesting that Nelson's actions were involuntary. Further, even though the prosecutor knew that the witness was not being fully responsive, he took no steps to correct the testimony. The court of appeals held that a prosecutor has a duty to correct the misleading testimony of his witnesses when the prosecutor knows the testimony is misleading.[167]

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159. *Id.* at 485, 549 P.2d at 580. In a later case, the court of appeals held that a trial court's refusal to order a remand of an indictment obtained from a tainted grand jury was an abuse of discretion. *See* Wilkey v. Superior Court, 115 Ariz. 526, 566 P.2d 327 (Ct. App. 1977).

160. 137 Ariz. 39, 668 P.2d 882 (1983).

161. 137 Ariz. 272, 669 P.2d 1349 (Ct. App. 1983).

162. 139 Ariz. 422, 678 P.2d 1386 (1984).

163. In *Crimmins*, a case brought on special action, the Arizona Supreme Court reviewed the trial court's denial of the defendant's Rule 12.9 motion.

After discovering that his home had been burglarized, Crimmins confronted some teenagers whom he suspected of the burglary. Crimmins detained one of the teenagers by locking him in a vehicle. Subsequently, the teenager escaped and contacted his parents while Crimmins left to phone the police. The parents, in turn, summoned the police. Later that evening, Crimmins was arrested on kidnapping and assault charges.

At the grand jury presentation, the prosecutor failed to instruct the jury on any citizen's arrest statute, and elicited testimony to the effect that the teenager was not involved in the burglary of Crimmins' home. This testimony contradicted police reports. *Crimmins*, 137 Ariz. at 40-42, 668 P.2d at 883-85.

164. *Id.* at 41, 668 P.2d at 884.

165. *Id.* at 42, 668 P.2d at 885. The court held that the combination of a misleading factual presentation and inadequate legal instructions was proper grounds for remanding the indictment. *Id.* at 43, 668 P.2d at 886.

In his special concurrence, Justice Feldman would have gone even further and found that the prosecutor engaged in grand jury abuse and deprived the grand jury of its right to make independent determinations of probable cause. *Id.* at 44, 668 P.2d at 887 (Feldman, J., specially concurring).

166. *Nelson*, another special action proceeding, reviewed a trial court's denial of the defendant's motion to dismiss. Nelson was charged with kidnapping a young woman whom he had allegedly forced to walk with him. Testimony before the grand jury revealed that after Nelson was informed of his *Miranda* rights, he asked to speak with his attorney and psychiatrist. After this testimony, a juror asked the witness if Nelson was under psychiatric care at the time of the incident, or if the witness knew of anything indicating that Nelson might be "out of touch with reality at the time of the offense." *Nelson*, 137 Ariz. at 273-75, 669 P.2d at 1350-52.

167. *Id.* at 277, 669 P.2d at 1354. In ruling as it did, the court extended the holding found in

In *Mauro*, the supreme court reversed the trial court[168] and held that a prosecutor's failure to present exculpatory evidence did not constitute a denial of due process. Citing *State v. Baumann*,[169] the court reiterated the familiar rule that the state was not obligated to present all exculpatory evidence absent any grand jury request, but it did enunciate a rule that the state was obligated to present, without prior grand jury request, "clearly exculpatory" evidence.[170]

The Inadequacy of the Judicial Response

Despite these determined efforts by the courts, such holdings[171] have proven inadequate to guarantee the grand jury's independence.[172] These holdings can only correct the symptoms of prosecutorial dominance over the grand jury rather than the problem itself. This is hardly surprising because the problem lies in the county grand jury *system*. Such systemic problems are best corrected by legislation.

The court's predominant weapon in its struggle to maintain the grand jury's independence is the remand for a redetermination of probable cause. Such a remedy, however, merely sends a message to the prosecutor that he may freely violate the grand jury's independence, and, if caught in acts of misconduct, the worst that will happen is that the prosecutor will get a second chance to indict the suspect again properly. And, while the more drastic sanction of a dismissal with prejudice may be an effective deterrent, the grant of permanent immunity to possibly guilty offenders imposes serious consequences on society.[173]

United States v. Basurto, 497 F.2d 781, 785 (9th Cir. 1974), which requires the setting aside of an indictment obtained with knowingly *perjured* and material testimony. In support of this extension, the court emphasized the attending prosecutor's duty of good faith to the grand jury and the suspect, and the court noted that since the suspect has no opportunity to cross examine or rebut the state's misleading evidence, it is "particularly incumbent" upon the prosecutor to correct the use of misleading testimony. *Nelson*, 137 Ariz. at 276-77, 669 P.2d at 1353-54.

168. In *Mauro*, the defendant was charged with child abuse and first-degree murder in the asphyxiation death of his son. The defendant allegedly kept his son locked in a bathroom for three days before killing the boy when the boy began to scream incessantly. The defendant later confessed to slaying his son "because his son was the devil." The defendant led police to the body.

The defendant argued that the state should have presented the grand jury with all the evidence concerning his mental health history—evidence exculpatory in nature. The trial court agreed and granted the motion. *Mauro*, 139 Ariz. at 423-25, 678 P.2d at 1387-89.

169. 125 Ariz. 404, 408-09, 610 P.2d 38, 42-43 (1980).

170. The court defined clearly exculpatory evidence as "evidence of such weight that it would deter the grand jury from finding the existence of probable cause." *Mauro*, 139 Ariz. at 425, 678 P.2d at 1389 (citing *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979). The court stated, however, that evidence of insanity is not clearly exculpatory because such a defense is "established only after lengthy and complex expert testimony." 139 Ariz. at 425-26, 678 P.2d at 1389-90.

See also United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okla. 1977), for a well-reasoned argument supporting the theory that a prosecutor should make the grand jury aware of *all* exculpatory evidence.

171. *See supra* notes 147-70 and accompanying text.

172. In fact, research indicates that the local Pima County judges believe that they "have very little power" to change the view that the grand jury is an "arm of the prosecutor." N. AMES & D. EMERSON, *supra* note 6, at 144.

173. *See* Serubo v. United States, 604 F.2d 807, 817 (3d Cir. 1979) ("We recognize that dismissal of an indictment may impose important costs upon the prosecution and the public....We suspect that dismissal of an indictment may be virtually the only effective way to encourage compliance with...ethical standards, and to protect defendants from abuse of the grand jury process.")

Courts have attempted to maintain grand jury independence by regulating the prosecutor's presentation of evidence and law and also by enforcing the prosecutor's good faith duty. However, these efforts have failed to sever the umbilical cord running from the grand jury to the prosecutor's office. None of these rulings eliminate the jurors' need to depend upon the prosecutor's office for daily administrative needs, nor, and more importantly, do they eliminate the jurors' reliance upon the prosecutor for legal advice. The psychological connections and possible fusion of goals between the grand jury and the prosecutor still remain.

A CONCLUSION: PROPOSED INSTITUTIONAL REFORMS

Institutional reforms are the more effective and socially beneficial method for curbing the abuse of the grand jury by the prosecutor. The legislature ought to establish a separate and independent grand jury office for each county.[174] The grand jury office would be responsible for all the administrative tasks concomitant with the proper functioning of the grand jury as well as establishing an independent legal counsel who would monitor grand jury proceedings and serve as the jury's legal advisor.[175] Thus, the grand jury would be under the rubric of a government entity chartered specifically to maintain an independent and impartial grand jury. Such an umbrella organization would provide the grand jury with the wherewithal to become an effective independent body.[176] In addition, such an organization would reinforce and help grand jurors understand the quasi-adversarial nature of their relationship with the prosecutor.

Secondly, counsel for the prospective indictee ought to be allowed to attend the grand jury proceedings,[177] although the jurors' actual deliberations would remain secret.[178] Counsel for the prospective indictee would not be allowed to participate in the proceedings, but would merely be allowed to observe, thus preventing possible "mini-trials" at the probable cause hearing.

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174. The grand jury office can either be an independent county agency, or a unit of the county superior court similar to the presently existing Division of Pre-trial Services. This proposed reform goes further than a mere proposal to create an independent legal counsel for the grand jury. *See* D. EMERSON, *supra* note 6, at 31-32.

175. *E.g.*, helping the grand jurors with their employment difficulties, providing guidance for the grand jury in their administration of their term, preparing the foreman's "script" referred to *supra* note 105 and accompanying text. The actual selection of potential grand jurors would still be handled by the county jury commissioner.

176. *See* D. EMERSON, *supra* note 6, at 21. *See generally* Bickner, *The Grand Jury—A Layman's Assessment*, 48 Calif. St. B.J. 660 (1973).

177. Current Arizona law authorizes only the presence of counsel for any witness only if that witness is a target of the grand jury's investigation. ARIZ. REV. STAT. ANN. § 21-412 (1975); ARIZ. R. CRIM. P. 12.5.

178. Legitimate prosecutorial secrecy requirements can still be protected even if defense counsel are granted the opportunity to be present at the proceedings. If the prosecutor believes it is necessary to proceed without notifying the defendant, based on a reasonable fear that the defendant will flee the jurisdiction, or that witnesses' lives will be endangered, then the prosecutor would be allowed with court approval, to proceed with an *ex parte* grand jury presentation.

Additionally, in an overwhelming number of cases brought before the Pima County Grand Jury, the putative defendant has already been put on notice by either being arrested or summoned before a magistrate for his initial appearance. *See* Proceedings, GJ-76, Instructions (Sept. 17, 1986), *supra* note 87, at 18, 21-22; and N. AMES & D. EMERSON, *supra* note 6, at 31-33. Thus, the issue of a secret grand jury proceeding will surface relatively rarely.

Such an observatory role for defense counsel is analogous to a defense attorney's role at pre-indictment identifications.[179]

Thirdly, the prosecutor ought not be allowed to rely solely and exclusively on hearsay. While such reliance is not constitutionally prohibited,[180] hearsay evidence impairs the grand jury's role as an independent determiner of probable cause.[181] The grand jury is unable to assess the true nature of the state's case through observation of "appearance[s], demeanor[s], and background[s] [which] would cast doubt on the reliability" of the state's evidence.[182] For these reasons the use of hearsay ought to be limited.[183]

These proposed institutional reforms would go far towards re-establishing the grand jury's independence. Through the centuries, the grand jury, as an institution, has undergone an evolutionary process. What once had its beginnings as a source of royal revenue rose to challenge and defy kings. Not only did the grand jury stand as a "bulwark" between the state and the individual, but it helped preserve civil stability during the American Revolution. While few would argue that the grand jury should re-assert itself as an ombudsman in today's society, the grand jury still has the potential to fulfill a valuable function in our democracy. As grand jurors, common citizens can participate in our criminal justice system at a stage earlier than trial. The severe consequences of accusation gives importance to this earlier participation.

The current Arizona county grand jury system fails to adequately preserve the grand jury's independence. The system fails its promise. The system is frequently used as a mere convenience—a *pro forma* method of obtaining a probable cause determination. The grand jury is not the only method of ascertaining probable cause, the preliminary hearing is always available. But when the state chooses to utilize the grand jury system, that system must provide effective safeguards against intrusion upon the grand jury's independence.

The Arizona courts wage a war of attrition in their battle to preserve the ideal of the independent grand jury. Case-by-case protection of grand jury independence is insufficient. Giving an individual the opportunity to challenge a tainted indictment only after suffering formal accusation is not enough. If the state proceeds with a grand jury system, an individual has the right to an independent grand jury in the first instance. In the current situation only institutional reforms can secure that right.

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179. *See* Moore v. Illinois, 434 U.S. 220 (1977). Furthermore, given the fact that an overwhelming majority of cases presented to the grand jury are returned as true bills, a prospective indictee in Pima County effectively faces the "prosecutorial forces of organized society," before actually being indicted, thus arguably triggering the right to an attorney. *See id.* at 228 (citing Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

180. Costello v. United States, 350 U.S. 359 (1956).

181. The "excessive use of hearsay in the presentation of government cases tends to destroy the historical function of grand juries in assessing the likelihood of prosecutorial success and tends to destroy the protection from unwarranted prosecution that grand juries are supposed to afford to the innocent." United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966).

182. S. BEALE & W. BRYSON, *supra* note 6, § 10.6.

183. *See e.g.*, ALASKA R. CRIM P. 6(r) and Adams v. State, 598 P.2d 503, 508 (Alaska 1979), where hearsay is admissible before the grand jury only if there is "compelling justification."